Petition

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No. 81-1398

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

VINCENT V. SKRUZNY,

Petitioner,

v.

L.R. MYERS LT., W.R. GLAU CPS-I., T.J. MARCH CPS-I., individually and in their official capacities as correctional officers of the California Department of Corrections; DR. THUMMA, M.D., DR. MABANAG, M.D., individually and in their official capacities as medical doctors of the California Department of Corrections.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Vincent V. Skruzny
1305 Laguna Street
Apartment 5
San Francisco, California 94115

Petitioner in propria persona

QUESTIONS PRESENTED

Petitioner, a physically totally disabled former prisoner of the California Department of Corrections, brought suit under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 against five prison officials for violating his civil rights. The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court for the Central District of California which granted defendants summary judgment. The questions thereby arising are:

1. Whether state correctional officers may impose punishment on a disabled prisoner whose only 'offense' is his disability.

2. Whether prison medical doctors may deny a totally disabled prisoner his back brace, prescribed for him by medical doctors several years prior to his incarceration, on grounds that it is against prison rules to allow prisoners to wear metal braces.

TABLE OF CONTENTS

	Page
Questions presented	1
Table of contents	2
Opinions below	3
Jurisdiction	3
Constitutional provisions involved ..	3-4
Statement of fact	4
Reasons for granting Writ	6
Conclusion	8
Proof of service by mail	9

AUTHORITIES

Constitution of the United States:

Eighth Amendment	3
Fourteenth Amendment	4

APPENDIX

Order denying rehearing	1
Memorandum	2-13
Notice of Appeal	14

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit denied petition for rehearing without opinion, Appendix, p.1, infra. The Memorandum of the United States Court of Appeals for the Ninth Circuit appears at Appendix, pp. 2-13, infra.

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit denying petition for rehearing was entered on September 2, 1981. See Appendix, page 1, infra. The petition for certiorari was filed within 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII: "..., nor cruel and unusual punishment inflicted."

Constitution of the United States,

Amendment XIV: "...No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The petitioner, VINCENT V. SKRUZNY, was a prisoner of the State of California in the custody of California Department of Corrections from August 1977 till July 1978, confined in California Men's Colony - East Prison, at San Luis Obispo, California. Due to an industrial accident prior to his incarceration, he was physically totally disabled, receiving Social Security Disability

pension. Petitioner's disability was a fact recorded in his prison file and was known to all defendants.

During September and October 1977 petitioner was ordered by the defendant correctional officers to do a hard physical labor. Due to his disability he was unable to comply with said orders. As a consequence he was cited for violation of prison rule and punished. To escape further punishment petitioner was forced to enroll in prison school.

In February and March 1978 petitioner requested from Dr. Thumma and Dr. Mabanag, respectively, the release of his own back brace to him, held at the prison, to ease the painful condition of his back caused by the daily attendance of prison school. Both doctors refused stating that it is against prison rules to allow prisoners to wear metal braces. Petitioner was thus forced to endure a great physical pain and a mental stress due to the conditions

created jointly by the defendants.

Many other prisoners were allowed to wear their metal braces, crutches, and a metal hook replacing a hand.

REASONS FOR GRANTING THE WRIT

Petitioner's disability was never questioned or disputed by any of the defendants. The three correctional officers and Dr. Thumma submitted no statement of any kind on their own behalf. Neither of the doctors declared petitioner to be able-bodied.

1. The Court of Appeals quoting the District Court in part states:

> "As pointed out by defendants, plaintiff felt that he couldn't work and he didn't work. The only punishment imposed was confinement to his cell. Such confinement was consistent with his claim of disability...." Appendix, page 6, infra.

The above represents a callous disregard for the less fortunate person. For to punish a disabled person for no other reason but his disability is not only cruel, but it is

barbaric and hardly in keeping with the evolving standards of decency that mark the progress of a maturing society. No person should be punished because he happens to be suffering from an illness or a physical impairment. Such an idea is a repulsive one and should not be entertained by civilized society.

2. Dr. Thumma submitted no affidavit contradicting petitioner's verified complaint which states that Dr. Thumma, without a medical examination refused petitioner his back brace and that said refusal was purely an administrative decision.

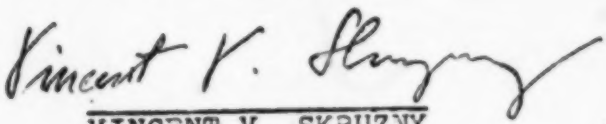
Dr. Mabanag submitted an affidavit in his own behalf which in part contradicts the complaint thus creating a dispute but it does not void the complaint. Dr. Mabanag instead of allowing petitioner to wear his own back brace gave him a rib belt, a substitute, which was as effective as giving a deaf person a pair of eyeglasses to help that person to hear.

Petitioner in his verified complaint states that neither doctor examined petitioner's back nor treated him for his back ailment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,



VINCENT V. SKRUZNY
1305 Laguna Street
Apartment 5
San Francisco
Calfornia, 94115

Petitioner in
propria persona

November 30, 1981.

PROOF OF SERVICE BY MAIL

I, the undersigned, say: I am the petitioner in the foregoing cause of action; a resident of the United States and over the age of 18 years; and a resident of the City and County of San Francisco, State of California; my address is:

1305 Laguna Street, apt. 5, San Francisco, California, 94115.

On December 1, 1981 I served three true copies of the attached Petition for Writ of Certiorari on the attorney for the defendants in said action, by placing a true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California addressed as follows:

MARK A. WEINSTEIN, Esq., Deputy Attorney General, 3580 Wilshire Boulevard, Suite 800, Los Angeles, California 90012.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 1st day of December 1981, at San Francisco, California.

Vincent V. Skruzny

APPENDIX

FILED SEP. 2, 1981

RICHARD H. DEANE
CLERK, U.S.COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT V. SKRUZNY, No. 80-5708

Appellant/Petitioner,

vs.

L.R. MYERS LT., et al.,

Defendants/Appellees.

O R D E R

Before: ALARCON and BOOCHEVER, Circuit Judges, and THOMPSON,* District Judge

The petition for rehearing is denied.

* Hon. Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

FILED JUL 23, 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT V. SKRUZNY, No. 80-5708

Plaintiff/Appelant,

vs.

L.R. MYERS LT., W.R. GLAU CPS-I., T.J. MARCH CPS-I., individually and in their official capacities as correctional officers of the California Department of Corrections; Dr. THUMMA MD., Dr. MABANAG MD., individually and in their official capacities as medical doctors of the California Department of Corrections,

Defendants/Appellees.

MEMORANDUM

Appeal from the United States District Court for the Central District of California, Harry Pregerson, District Judge, Presiding, Argued and submitted, June 2, 1981

Before: ALARCON and BOOCHEVER, Circuit Judges, and THOMPSON,* District Judge

This action was brought by a former

prisoner of the California Department of Corrections incarcerated in the California Men's Colony at San Luis Obispo. The defendants are three correctional officers and two medical doctors on the staff of the institition. Plaintiff pleads his case under 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 1343.

Plaintiff's action was commenced after his release on parole. His contentions with respect to a deprivation of civil rights are all predicated on the fact that he had been declared totally disabled for the purpose of Social Security benefits as a consequence of a back injury and that a preincarceration physician had prescribed a back brace for his use.

Plaintiff contends that the conduct of the defendants constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Contitu-

*Honorable Bruce R. Thompson, Senior United States District Judge, District of Nevada, sitting by designation.

tion. In his verified complaint he alleges: That on three occasions he was assigned to a work detail, that he refused to work because of his disability; that he received two citations for violation of the prison code for refusal to work, that after a hearing on the citation he was sentenced to confinement to his cell; that thereafter he avoided such punishment by attending school, which, inferentially, was an acceptable alternative. The four or five hours of school attendance allegedly caused plaintiff great misery and suffering because of his back injury. He does not allege, however, that he was ordered to attend school. He merely contends that he was "compelled" to attend by the circumstances to avoid confinment to his cell.

With respect to the doctors, plaintiff admitedlly was attended by doctors on three occasions. On the second occasion Dr. Thumma, M.D. refused him permission to wear his back brace. A week later Dr. Mabanag, M.D. also refused him permission to wear

the metal back brace, and prescribed for him a rib belt. In support of defendant's motion for summary judgment, Dr. Mabanag by afidavit averred: "At the time (March 6, 1978) I evaluated his need for a back brace and concluded that a rib belt support would meet Mr. Skruzny's medical needs. My decision to prescribe a rib belt support was a medical decision based on my evaluation of Mr. Skruzny's condition. Mr. Skruzny also received heat treatment at his request on numerous occasions to minimize his symptoms." In his verified amended complaint, plaintiff alleges that neither doctor gave him a "medical examination."

After the action was filed it was referred to a United States Magistrate. A motion to dismiss was filed and a hearing held. The Magistrate granted the motion to dismiss with leave to amend. Plaintiff filed an amended complaint. A motion for summary judgment was filed. A hearing was scheduled which plaintiff did not attend.

The Magistrate filed a Report and Recommendation on July 14, 1980, and made the following findings, in part:

> The affidavit of Dr. Mabanag (Exhibit A, Motion for Summary Judgment) indicates that there was a disagreement between plaintiff and the doctors as to his course of medical treatment but that it was not refused. Prison officials and medical officers have wide discretion in treating prisoners under their care and a simple claim of malpractice does not state a claim under the Civil Rights Acts.
>
> Plaintiff states that the correctional officers twice cited him for a violation of Prison Rule 3041 (refusal to work) for which, on one occasion, he was confined to his cell and he avoided further punishment by attending the prison school.
>
> As pointed out by defendants, plaintiff felt that he couldn't work and he didn't work. The only punishment imposed was confinement to his cell. Such confinement was consistent with his claim of disability. Plaintiff avoided further trouble by attending school. This does not amount to "cruel and unusual punishment."

The Clerk gave notice of the Report and Recommendations as required by the local rules and 28 U.S.C. Sec. 636. Plaintiff thereupon filed two objections: (1)

That the Magistrate had no jurisdiction to entertain a motion to dismiss or for summary judgment without consent of the parties; (2)that "Notwithstanding the above plaintiff submits that to force a prisoner, able-bodied or disabled, through fears of additional punishment and prolongation of his incarceration to attend school classes for several hours per day, the academic standard of which is a total illiteracy or at best a functional illiteracy, thus below his educational level (see Report of D.E. Sorensen, Senior Psychologist, dated 6/16/77, attached hereto, marked Exhibit A, and by this reference incorporated herein), is to subject said prisoner to an inescapable boredom and mental torment, a form of brain-washing, that must be clasified as cruel and barbaric and in violation of the Due Process of Law Clause."

Plaintiff attached a "Psychological Evaluation" madeas part of the admissions procedures which stated: Probably he could

be helped most during the present term by counseling or psychotherapy and light, part-timeemployment in keeping with his disabilities. This program of support could best be achieved at the California Men's Colony, and transfer to that institution is recommended." The district court accepted the Magistrate's recommendations and findings and entered judment for defendants.

On appeal plaintiff assigns as errors: (1) the action of the Magistrate prior to October 10, 1979 (the effective date of the ammendment to the Magistrate's Act) in dismissing the original complaint with leave to amend; (2) the action of the Magistrate in hearing the motion to dismiss or for summary judgment directed to the amended complaint witout the written consent of the parties; (3) granting summary judgment in the face of a verified amended complaint (affidavit)containing specific allegations; (4) concluding absence of cruel and unusual which is a question for the jury.

Plaintiff's attacks upon the jurisdiction of the Magistrate are meritless. The first order dismissing the complaint with leave to amend was not a final, dispositive order. Plaintiff acquiesced therein. The subsequent hearing on the motion for summary judgment directed to the amended complaint was fully consonant with the procedures prescribed by the amended Magistrate's Act then in effect. The reference was merely for a report, findings and recommendation. An opportunity to object was given. The district judge reviewed everything and entered final judgment. All was specifically authorized by 28 U.S.C. Sec. 636(b)(1)(B)& (C). The constitutionality of this statutory framework has been upheld. United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406 (1980).

We agree that a disputed issue of material fact, precluding summary judgment, may be created because of the specific averments of a verified complaint. Runnels v. Rosendale, 499 F.2d 733, 734 n.1.(9th

Cir. 1974). In the present case, however, the averments of Dr. Mabanag's affidavit (supra) are not met by a complaint which states that a doctor made a decision "without medical examination." This is purely a matter of semantics and represents the pleader's carefully phrased conclusion.

In any event, plaintiff here has waived his claim of absence of medical treatment by failing to object to the Magistrate's specific findings. The law, 28 U.S.C. Sec. 636 (b)(1)(B), provides:

> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to

the magistrate with instructions.

Here plaintiff did not object to the Magistrate's findings (supra) concerning adequate medical care within constitutional requirements. He also changed his attitude about school attendance, complaining only of mental torment because the instruction was geared to functionally illiterate people, not because attendance without a back brace caused physical torment.

The purpose of 28 U.S.C. Sec. 636(b)(1)(C) (supra) and of the provision that "A judge of the court shall make a de novo determination of <u>those portions of</u> the report or specified proposed findings or recommendations <u>to which objection is made</u>" (emphasis supplied) is to strengthen the Magistrate's role and to restrict the judge's duty to review the whole record to those portions only where proper objection has been made.

<u>In United States v. Lewis</u>, 621 F.2d

1382 (5th Cir. 1980) the court said:

> Jackson did not object to the magistrate's report and recommendations on the suppression motions. His failure to object is a waiver of his right to appeal the recommendations contained in the report. The Second Circuit recently reached the same conclusion. John B. Hull, Inc. v. Waterbury Petroleum Prod., Inc., 588 F.2d 24 (2d Cir. 1978), cert. denied, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979). Jackson's appeal is, accordingly, dismissed.

Accord, United States v. Walters, 638 F.2d 947 (6th Cir. 1981); Park Motor Mart, Inc. v. Ford Motor Co., 616 F2d 603 (1st Cir. 1980; John B. Hull, Inc. v. Waterbury Petroleum, 588 F2d 24 (2nd Cir. 1978); Consorcio Constructor Impregilo v. Mack Trucks, 497 F.Supp. 591 (E.D.Penn. 1980).

In the light of the entire record in this case, the district court's conclusion that none of the conduct alleged constituted cruel and unusual punishment is compelled as a matter of law. No jury trial is justified. There was no punishment "incompatible with the evolving standards of decency that

mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), or which involved "the unnecessary and wanton infliction of pain," Estelle v. Gamble, 429 U.S. 97, 103 (1976). See also: Rhodes v. Chapman, _____, U.S. ____, 49 U.S.L.W. 4677, June 15, 1981 (involving housing two prisoners in one cell).

Affirmed.

FILED SEP 9 1980

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VINCENT V. SKRUZNY, Plaintiff, vs. L.R. MYERS LT., et al., Defendants.	NO. CV 79-2772-HP(K) NOTICE OF APPEAL

Notice is hereby given that plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order granting defendants' motion for summary judgment, entered in this action on August 14, 1980.

Dated: September 2, 1980.

signed
Vincent V. Skruzny
1305 Laguna Street, apt5
San Francisco, Ca. 94115

Plaintiff in propria persona